judge did exactly what any prudent judge would have done under the circumstances—directed the jury to render a verdict for the party who he believed was in law entitled to it. He did not wish to be the cause of a mistrial and as the higher courts of his State had not passed the validity of a verdict entered by the clerk at the direction of a judge or a judgment so entered without the rendition of a verdict by the jury, he did the prudent thing by adopting a practice which he knew could not be questioned. The jury by their obstinacy defeated his attempt to follow the law. Perhaps as much of the dissatisfaction with our courts can be traced to a general lack of confidence in the findings of juries as to any other source. It is an opinion not infrequently expressed that twelve men, selected practically at random and certainly without much reference to their qualifications often uneducated, and inexperienced, are not competent to decide matters in controversy according to the law and the evidence and not able, when a conclusion has been reached as to the facts established, to apply the law thereto under the instructions of the court. Surely this editorial, which encourages jurors to refuse to render a verdict as the court directs and thus to usurp the province of the court, will not assist in bettering this condition. G. S.

THE LIABILITY OF MUNICIPAL CORPORATIONS IN THE DISCHARGE OF PUBLIC OR GOVERNMENTAL DUTIES AND OF PRIVATE OR CORPORATE DUTIES.—With respect to the general principles by which the liability of municipal corporations must be determined, the divergence of judicial opinion is not greater than might naturally be expected where the subject is so difficult and important, and the circumstances to which the principles are to be applied are so variant. These corporations are regarded with reference to some of their duties and functions as representing and acting for the state or sovereign, and with reference to others as acting for themselves, somewhat as private corporations; when acting in the former capacity they are generally not answerable for the acts or omissions of their officers or agents, but when acting in the latter capacity their liability is ordinarily the same as that of a private person or corporation. The great difficulty, and the great divergence of judicial opinion, arise from the fact that no test has been formulated by which to decide whether a particular act or omission occurred in the discharge of governmental or of quasi private duties. Thus in a recent case we find the Supreme Court of Mississippi declaring without the least hesitancy, that the driver of a city cart engaged in hauling trash and dirt for the city, is not engaged in a public or governmental duty so as to relieve the city of liability for an injury caused by his negligence in running over a child. *City of Pass Christian* v. *Fernandez* (Miss., 1911), 56 South. 329, 100 Miss. 76.

The test applied was that public or governmental duties of a city are those given by the state as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. One of the tests applied in New York is as follows, "To determine whether there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or nonfeasance is complained of, is a part

of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality." *Ehrgott* v. *Mayor*, 96 N. Y. 264, 273, 48 Am. Rep. 622. *Pettingill* v. *Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442. In Georgia, "Whenever the negligence or nonfeasance of the ordinary agents and servants of the corporation causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation is exercising, as a corporation, its private franchises, powers, and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though enuring ultimately to the benefit of the general public, then and only then, it becomes liable for the negligent exercise of such powers precisely as are individuals." *Wright* v. *Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256, 258. Some courts have applied the test of whether the municipal corporation derives a revenue from the service or not, others say that whether the work is of a commercial or of a public character should determine.

However, the distinction between these two classes of powers, public or governmental and private or corporate, has been frequently recognized and established in our courts. *Wilson* v. *Mayor of New York*, 1 Denio 595, 43 Am. Dec. 719. *Esberg Cigar Co.* v. *Portland*, 34 Ore. 282, 75 Am. St. Rep. 651. *Galveston* v. *Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517. *Wagner* v. *Portland*, 40 Ore. 389. It is recognized in 2 DILLON, MUN. CORP., Ed. 4, § 874, where it is stated that if the municipal corporation appoints or elects the servants or agents for whose acts it is claimed to be liable, and can control them in the discharge of their duties, and continue or remove them, and hold them responsible for the manner in which they discharge their trust, and if such duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim *respondeat superior* applies; but that if they are elected or appointed by the corporation in obedience to statute, to perform a public service not peculiarly local or corporate, and are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as agents or servants of the municipality, but as public or State officers, and the doctrine of *respondeat superior* is not applicable.

The doctrine also finds expression in a different form in such cases as *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Bowden* v. *Kansas City*, 69 Kan. 587, 66 L. R. A. 181, 105 Am. St. Rep. 187; and *Kobs* v. *Minneapolis*, 22 Minn. 159, which draw a distinction between those duties which are legislative or judicial in their nature, and therefore discretionary, in which case there is no liability, and those duties which are absolute and perfect, or merely ministerial, for negligence in the performance of which the municipality is held liable. See also 2 DILLON, MUN. CORP., Ed. 4, § 966.

On the other hand the South Carolina courts are opposed to making any

distinction between public and private functions, because of the difficulty of carrying the doctrine into anything like uniform practice. *Black* v. *Columbia,* 19 S. C. 412, 45 Am. Rep. 785, affirmed in the recent case of *Irvine* v. *Town of Greenwood* (S. C., 1911), 72 S. E. 228.

But the distinction spoken of is quite generally recognized, and the courts seldom disagree in stating the rule, though as these two powers—governmental and corporate—approximate each other, it is often difficult to ascertain the exact line of distinction. In this conflict as to the application of the rule to various municipal activities, the removal of refuse, ashes, or garbage by the city proves no exception.

In *Love* v. *Atlanta,* 95 Ga. 129, 51 Am. St. Rep. 64, the defendant city was held not liable for injuries caused by the running away of a mule attached to a garbage cart belonging to the city. The mule was in use by the city under the direction of the health board, cleaning the streets and removing offensive substances therefrom, and the court held this to be a governmental duty, upon the ground that it tended to the preservation of the public health.

Though the decision was placed upon another ground, in *Kuehn* v. *Milwaukee,* 92 Wis. 263, 65 N. W. 1030, the court held the city not liable for dumping its garbage into Lake Michigan saying, that had the work been done by the city through its servants and employees, instead of by an independent contractor, the result would be the same, as the municipality was engaged in a public or governmental service.

Again in *Condict* v. *Jersey City,* 46 N. J. L. 157, the city was held not liable for an injury due to the negligence of a driver employed by the board of public works to remove ashes and refuse from boxes and barrels placed upon the sidewalks by the inhabitants, the duty being held a public one.

And the Massachusetts court, while recognizing the general rule that a municipality which voluntarily undertakes work of a commercial character, from which it seeks to derive revenue or other special advantage, is liable for the negligence of its servants, holds that the removal, under statutory authority, of ashes from dwelling houses within its limits is a service of a public nature, and that the city is not liable for the negligence of its employees, where the removal is without cost, notwithstanding just enough charge is made to cover expenses for the removal of ashes from manufacturing plants. *Haley* v. *City of Boston,* 191 Mass. 291.

Also in *Conelly* v. *Nashville,* 100 Tenn. 262, the city was held not to be liable for the negligence of the driver of a street sprinkling cart, the sprinkling of streets being held a governmental duty falling under that section of the charter providing that the corporate authorities may, "make regulations to secure the general health of the inhabitants." *Accord*: *Kippes* v. *City of Louisville,* 140 Ky. 423.

In a recent case the Kentucky court goes even further and relieves the city of liability where a child was run over by a refuse wagon attached to a sprinkling cart, both used by the defendant in the care of its streets. At the time of the injury the sprinkler was not being used for sprinkling purposes, but to haul the refuse wagon to another part of the city. Nevertheless both were held to be engaged in governmental work, and though the wagon could

have been moved in a safer manner, the court said, "the city is not required to use the safest or best, or any particular means in the conduct of its governmental business," this being left to its discretion. *City of Louisville* v. *Carter* (1911), 142 Ky. 443.

Again in *Johnson* v. *City of Somerville*, 195 Mass. 370, 10 L. R. A. (N. S.) 715, it is held that the decision of a municipal corporation to remove ashes from the residences of citizens need not be signified by an ordinance, and the city is not liable for injury to adjoining property caused by one so employed, in dumping ashes into a watercourse on private land, the act, whether intentional or negligent, being one done in a public service in the performance of a public duty.

A different result, however, is reached by the Appellate Division of the Supreme Court of New York in *Quill* v. *New York*, 36 App. Div. 476, 55 N. Y. Supp. 889, where it is held that the removal of ashes and garbage is not a governmental function, but a private duty, which would otherwise rest upon the property owners of the municipality, and that the city is liable to one injured through the negligence of the driver of an ash and garbage cart belonging to its street cleaning department. The court also disapproved of the decisions in *Bishop* v. *New York*, 21 Misc. 598, 48 N. Y. Supp. 141, and *Davidson* v. *New York*, 24 Misc. 560, 54 N. Y. Supp. 51. The *Bishop* case held that the removal of ashes in pursuance of duties imposed on the street cleaning department was a governmental service, and this decision was followed in the *Davidson* case, where the driver of the cart was engaged in removing waste paper and other trash from residences. In another New York case, *Missano* v. *New York*, 160 N. Y. 123, 54 N. E. 744, the decision was placed on the ground that removing ashes from the street was a part of the duty of a municipality in caring for its streets which the court held was not a governmental service; and the fact that it might incidentally affect the public health did not render it a public function. GRAY, J., dissented on the ground that the duty of street cleaning relates to the protection of the public health and is therefore governmental; that the driver of the ash cart was under the immediate control of the street commissioner who was engaged in performing a duty laid by the law upon him, and under the principle of the decision in the leading case of *Maxmilian* v. *Mayor, etc., of N. Y.*, 62 N. Y. 160, 20 Am. Rep. 408, the city would not be liable for his negligence. The decisions in *Condict* v. *Jersey City*, N. J. L. 157 and *Conelly* v. *Nashville*, 100 Tenn. 262, *supra*, were approved.

In *Young* v. *Met. St. Ry. & Kansas City*, 126 Mo. 1, the court, admitting the authorities to the contrary, considers the better rule to be that which holds the city liable for the negligence of its servants in cleaning its streets, though to keep them clean may incidentally promote the public health. The case of *City of Denver* v. *Porter*, 61 C. C. A. 168, holding that, "the test is not one of casual or incidental connection, for if the duty in question is substantially one of local or corporate nature, the city cannot escape responsibility for its careless performance because it may, in some general way also relate to a function of government," is cited with approval. To the same effect is the holding in *Barney Dumping Boat Co.* v. *New York*, 40 Fed. 50.

So also in the *City of Denver* v. *Davis*, 37 Colo. 370, 6 L. R. A. (N. S.) 1013, it was held that the city was liable for a fire resulting from a servant of the health department depositing ashes, paper, straw, rags, and like material upon a dumping ground, the maintenance of such ground being for the convenience of the inhabitants and not performed in the exercise of any governmental function. But in *Ft. Worth* v. *Crawford*, 64 Tex. 202, 53 Am. Rep. 753, 74 Tex. 404, 15 Am. St. Rep. 840, the establishment of a dump yard was held to be a sanitary measure and to involve a public and not a corporate duty, though the municipality was liable in case it negligently permitted the dump to become a nuisance, while in *Ostrom* v. *San Antonio*, 94 Tex. 523, the court held that a city, while engaged in cleaning its streets and disposing of garbage, acts for the benefit of its own people, and not in the discharge of the duties of the general public, and is liable for the unlawful acts of its agents in so doing. The New York Court seems at the outset to have washed its hands of the whole matter of laying down any criterion by saying, "All that can be be done probably with safety is to determine, as each case arises, under which class it falls," *Lloyd* v. *Mayor, etc., of New York*, 5 N. Y. 369, 55 Am. Dec. 347; but see the statement of the principle of exemption in *Hayes* v. *Oshkosh*, 35 Wis. 314.

In the principal case, if the test of pecuniary profit to the city be applied, or if the function of street cleaning be considered as relating to the health of the citizens, the act must be held governmental. The whole difficulty lies in the fact that as yet no definite test has been formulated which has been generally adopted. In view of the increasing assumption by our cities of greater and more varied corporate activities, it is essential that some definite line be drawn, that some uniform rule be used as a standard guide, before the whole subject of municipal liability is befogged by a mass of conflicting decisions. N. K. F.

SOME VIEWS OF THE NATURE AND EFFECT OF CORPORATENESS.—The wide application of the corporate form of organization to the various enterprises of an increasingly complex business world during the past century has brought not only great additions, but some substantial modifications, to the body of corporation law. It has thrown new light upon the meaning and legal effect of corporateness itself. See 1 WILGUS, CORP. CAS., 72 *et seq.*, 109 *et seq.*, 157 *et seq.* A case recently before the Federal court in New York is illustrative of this latter fact. In an opinion which declared that the undertaking and obligation of one subsidiary corporation to assume the debt of another subsidiary corporation was in effect the undertaking and obligation of the parent or holding corporation of both, the court proceeded to summarize, in so far as it was applicable to the case before it, the present state of the law upon this important question. "There are," it was said, "at least two exceptions to the general rule of separate corporate existence and liability, * * * viz.: (1) The legal fiction of distinct corporate existence * * * will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct